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 FORD MOTOR CREDIT COMPANY LLC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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| IN RE: REAGOR-DYKES MOTORS, LP Debtor. | § § § § § | Case No. 18-50214-rlj11 |
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| IN RE: REAGOR-DYKES IMPORTS, LP Debtor. | § § § § § | Case No. 18-50215-rlj11 (Jointly Administered Under Case No. 18-50214) |
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| IN RE: REAGOR-DYKES AMARILLO, LP Debtor. | § § § § § | Case No. 18-50216-rlj11 (Jointly Administered Under Case No. 18-50214) |
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| IN RE: REAGOR-DYKES AUTO COMPANY, LP | § § § § | Case No. 18-50217-rlj11 (Jointly Administered Under |

| | | |
|-----------------------------------|---|------------------------------------|
| Debtor. | § | Case No. 18-50214) |
| | § | |
| IN RE: | § | |
| | § | |
| REAGOR-DYKES PLAINVIEW, LP | § | Case No. 18-50218-rlj11 |
| | § | (Jointly Administered Under |
| Debtor. | § | Case No. 18-50214) |
| | § | |
| IN RE: | § | |
| | § | |
| REAGOR-DYKES FLOYDADA, LP | § | Case No. 18-50219-rlj11 |
| | § | (Jointly Administered Under |
| Debtor. | § | Case No. 18-50214) |

MOTION TO APPOINT CHAPTER 11 TRUSTEE

PURSUANT TO 11 U.S.C. § 1104(a) and (b)

Secured Creditor, Ford Motor Credit Company LLC (“Ford Credit”), by and through its undersigned counsel, moves this Court to appoint a Chapter 11 Trustee in this bankruptcy case pursuant to 11 U.S.C. § 1104(a) and (b), on the grounds that Reagor-Dykes Motors, LP and other related Debtors entities (“Debtors”) have committed acts constituting fraud, dishonesty, and gross mismanagement of the affairs of the Debtors, and such appointment is therefore in the best interests of creditors.

This Motion is based upon the following memorandum of points and authorities, the attached exhibits, declaration of Paul A. Boudreau and oral argument that the Court may allow at a hearing on this Motion.

JURISDICTION AND VENUE

This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. §§ 1408 and 1409. This subject matter of this Motion is a core proceeding pursuant to 28 U.S.C. § 157. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 105(a) and 1104(a) of the Bankruptcy Code.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Up until July 30, 2018, Debtors sold new and used cars financed by Ford Credit and, instead of honoring their promise and contractual obligations to repay Ford Credit the amount it had loaned Debtors to acquire those vehicles, Debtors pocketed over \$41 million previously advanced by Ford Credit. This may be one of the largest floor-plan-financing frauds in the history of the United States.

Debtors hid this massive breach from Ford Credit in several ways. First, Debtors fraudulently misrepresented sales-reporting data to Ford Credit such that Ford Credit believed Debtors were timely paying off cars it sold to the public. In reality, Debtors had been engaging in a scheme similar to check-kiting whereby it actually sold vehicles on average 55 days before telling Ford Credit, thus allowing Debtors to “float” the debt it owed to Ford Credit.

Second, Debtors fraudulently secured double-flooring from Ford Credit. Double-flooring refers to automobile dealers who receive acquisition funding twice for the same vehicle. This is a serious violation of any inventory financing agreement and represents a significant violation of a dealer’s representations and warranties made to its lenders. *See U.S. v. Hoover* (5th Cir. 2006) 467 F.3d 496, 497 (double flooring is “an illegal practice whereby a single vehicle is used as collateral for more than one loan.”).

Third, Debtors fraudulently obtained inventory financing for cars it had already sold. In other words, while Debtors no longer possessed and had no rights in the car, they would represent to Ford Credit that they still held the car as inventory and then obtained additional financing.

There is ample cause to appoint a Chapter 11 Trustee. Debtors’ pervasive fraud and dishonesty have harmed the estate and its creditors. Debtors have already squandered more than \$41 million on the current management’s watch—through either their own fraud or gross mismanagement. Either way, a Chapter 11 Trustee is necessary to protect what is left of the estate’s assets and to righteously pursue claims of prepetition misdeeds.

STATEMENT OF FACTS

Ford Credit is the “floor plan” or “inventory” lender and it financed Debtors’ inventory of cars and trucks for resale to consumers. Prior to the petition, Ford Credit and Debtors entered into agreements titled Automotive Wholesale Plan Application for Wholesale Financing and Security Agreement (the “Wholesale Agreement”), by which Ford Credit agreed to finance Debtors’ acquisition of new and used automobiles, trucks and other vehicles.

In consideration of Ford Credit’s agreement to finance Debtors’ inventory, and to secure Debtors’ obligations under the Wholesale Agreement owed to Ford Credit, Debtors granted Ford Credit a blanket security interest in Debtors’ inventory of vehicles as well as all parts, furniture, fixtures, equipment and general intangibles (primarily the franchise value), and the income generated by the sale of those assets (the “Collateral”). Ford Credit has a perfected, first priority security interest in the Collateral.

Mechanics of “Floor Plan” Lending

Ford Credit provides floor plan financing, or “flooring,” that dealers use to pay vehicle manufacturers for new vehicles. When a dealer sells a “floored” vehicle, it must repay Ford Credit within deadlines contractually agreed to by the dealer. If it fails to do so, in effect converting the borrowed funds to its own use, the dealer breaches its financing agreement with Ford Credit and is said to be “out of trust” or “SOT” (sold out of trust). Because Ford Credit normally has only the floored vehicles as security for repayment, it demands immediate payment of out of trust obligations and/or seeks additional security.

The process by which Debtors obtained financing for used vehicles differed from the process by which it obtained new vehicles. On their own initiative, Debtors searched for, selected, and purchased used vehicles from auctions and other sources. To purchase these vehicles, Debtors had to request funding from Ford Credit to add those used vehicle purchases to its floor plan.

Ford Credit required Debtors to pay the unpaid balance of any loan with respect to a vehicle no later than seven days after the sale date. Failure to comply with this payment

obligation constitutes a breach of the Wholesale Agreement. If a vehicle is sold, and the outstanding balance is not paid off as required, the vehicle is SOT.

Ford Credit's normal custom and practice is to conduct periodic audits to confirm that dealer-borrowers like Debtors are complying with their loan repayment requirements. These audits can occur as little as twice a year, or as often as once a month or more. During its audits, Ford Credit's auditors visit the dealership to count the vehicles and determine whether a dealer-borrower is repaying Ford Credit in compliance with its obligations. If Ford Credit discovers a sold vehicle for which loan repayment is due, Ford Credit makes demand for payment at the conclusion of the audit. If the loan repayment is not made, then the vehicle is deemed "SOT."

Ford Credit is harmed when a dealer like Debtors sells a vehicle "out of trust" because Ford Credit's collateral is gone. A SOT is a serious breach of the Wholesale Agreement because the dealer's debt to Ford Credit becomes unsecured—Ford Credit cannot recover a vehicle sold to a customer in the ordinary course of business under Texas Business & Commerce Code § 9.320.

Pre-Petition Fraud and Litigation

Ford Credit audited the Debtors in June of 2018. While an initial examination of the audit report showed that the Debtors had a commendably low percentage of vehicles in violation, subsequent inspection of the audit report revealed significant red flags. Typically, Ford Credit expects about 5% of a dealership's inventory to be "Sold Not Due," vehicles which have been sold within the last few days to which payment to Ford Credit is not yet due. However, an average of 25.02% of the Debtors' inventory was listed as Sold Not Due. This number indicated to Ford Credit that the Debtors had either sold 25% of their inventory within the last week, an unlikely scenario, or that the Debtors were falsifying their sales dates. In response, Ford Credit obtained sales and registration data from the Texas DMV to compare the sale dates reported by the Debtors with the official sale dates identified by the Texas DMV.

Ford Credit compared a total of 150 reported sales by the Debtors and determined that 147 of the 150 sale dates reported by the Debtors did not match the official sale dates identified by the Texas DMV. Of the 147 falsified sale dates, there was an average discrepancy of 55 days

between the official sale date as identified by the Texas DMV and the falsified sale date reported by Debtors to Ford Credit. In other words, for nearly every vehicle it sold leading up to the June 2018 audit, Debtors fraudulently concealed (and ultimately misrepresented) the sale date from Ford Credit so that the Debtors could retain (*i.e.*, float) the sales proceeds without having to repay Ford Credit as required under the Wholesale Agreement.

Ford Credit has also determined that Debtors double-floored at least 85 vehicles under its floor plan financing agreements with Ford Credit. In those instances, Debtors obtained floor plan financing for a vehicle at one of their six dealerships, but then did so again for the same vehicle at a different dealership. Here's an example of how the scheme worked: one of Debtors' dealerships ("Store A") represents to Ford Credit that it purchased a Ford Explorer for \$40,000. In response, Ford Credit advances \$40,000 in acquisition financing to Store A. But then, unbeknownst to Ford Credit, Store A transfers the Ford Explorer to another of Debtors' dealerships ("Store B"). Store B then fraudulently represents to Ford Credit that it has purchased a Ford Explorer for \$40,000, which prompts Ford Credit to advance **an additional** \$40,000 in acquisition financing to Store B.

Ford Credit discovered the double-flooring after an internal risk assessment report discovered 16 double-floored vehicles. While Ford Credit's analysis of the double-floored vehicles is ongoing, Ford Credit estimates external financiers advanced \$3.7 million to Debtors for acquisition of the 115 vehicles which were already floored by Ford Credit.

Finally, Ford Credit discovered that Debtors fraudulently sought and obtained floor plan financing for several vehicles it had already sold—and obtained the sales proceeds of. In those instances, Debtors represented to Ford Credit that it possessed certain used vehicles and requested floor plan financing to cover the costs of acquisition. That proved to be untrue. In fact, Debtors had already sold those vehicles, obtained the sales proceeds, and had no further interest or rights in the vehicles. Ford Credit has yet to determine how much it advanced to Debtors for its acquisition of the vehicles Debtors had already sold at the time it requested floor plan financing.

On July 26 and 27, 2018, Ford Credit conducted another audit of Debtors' vehicle inventory. The July audit revealed that Debtors was significantly out-of-trust. As of July 31, 2018, Ford Credit determined that Debtors had failed to repay Ford Credit as required under the Wholesale Agreement on vehicles totaling **over \$41 million** in unpaid loan advances for which the vehicle collateral is gone.

As the foregoing shows, Debtors have committed multiple acts constituting fraud, dishonesty, and gross mismanagement of the affairs of the Debtors. Accordingly, the appointment of a Chapter 11 Trustee is in the best interests of creditors.

STANDARD OF REVIEW

Section 1104(a)(1) of the United States Bankruptcy Code provides for the appointment of a trustee in a Chapter 11 case:

At any time after the commencement of the case but before confirmation of the plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee –

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the Debtors by current management, either before or after the commencement of the case or similar cause, but not including the number of holders of securities of the Debtors or the amount of assets or liabilities of the Debtors;

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the Debtors or the amount of assets or liabilities of the Debtors.

11 U.S.C. § 1104(a).

Whether there are sufficient grounds for appointment of a trustee under § 1104(a) is a matter for the Court's discretion. See, *In re American Preferred Prescription, Inc.*, 250 B.R. 11, 15-18 (E.D.N.Y. 2000) *amended on other grounds*, 265 B.R. 13 (E.D.N.Y. 2000), judgment reversed on other grounds, 255 F.3d 87 (2d Cir. 2001) (explaining when a trustee may be appointed under § 1104(a) of the Bankruptcy Code); *In re Anchorage Boat Sales, Inc.*, 4 B.R.

635, 644 (Bankr. E.D.N.Y. 1980) (same); *In re L.S. Good & Co.*, 8 B.R. 312, 314 (Bankr. N.D.W.Va. 1980) (same).

As explained below, the factors for the appointment of a chapter 11 trustee as set forth in 11 U.S.C. § 1104(a) are satisfied in this case.

ARGUMENT

I. A CHAPTER 11 TRUSTEE SHOULD BE APPOINTED FOR CAUSE, BECAUSE CURRENT MANAGEMENT HAS COMMITTED ACTS OF FRAUD, DISHONESTY, INCOMPETENCE, AND GROSS MISMANAGEMENT.

Cause exists for the appointment of a chapter 11 Trustee, due to the fraud, dishonesty, incompetence, and gross mismanagement of the affairs of the Debtors.

There are several instances of fraud, any one of which would be sufficient grounds for appointing a trustee. First, Debtors' current management has already committed several frauds. The current management has intentionally misrepresented the reported sales dates of vehicles in order to hold on sales proceeds that Debtors agreed to repay Ford Credit within 7 days of a vehicle sale. Rather than timely remitting payment to Ford Credit, Debtors surreptitiously retained hundreds of thousands of dollars owed to Ford Credit.

The current management has also engaged in fraudulent double-flooring of vehicles. Double flooring is more than just a contract breach. It is loan fraud and, if proven to be true, a crime punishable by years in prison.¹

The current management committed similar fraud by obtaining floor plan financing for vehicles it had already sold to other customers. Debtors knew it no longer possessed nor had any rights in the vehicle and yet it nevertheless falsely represented to Ford Credit that it did. Ford Credit relied on Debtors' representation and advanced hundreds of thousands to Debtors.

There is also good cause to appoint a trustee due to the current management's incompetence and gross mismanagement. Debtors may have caused one of the largest floor-

¹ See generally, *USA v. Spangenberg et al.* (US District Court, District Oregon, Case No. 3:12-cr-00004-SI-1). (Federal prosecution against former owners of car dealership for floor plan inventory fraud including double-flooring vehicles; owners sentenced to 18 months and one year, respectively, in prison).

plan-financing defaults in the history of the United States. And while the size of the default is certainly significant, the fact that it occurred during years of unprecedented car-sale growth is just as telling. Since its nadir in 2009, the automotive market for new and used cars and trucks has exploded. Annual U.S. car and truck sales topped 17 million for the third straight year in 2017.² But despite the sustained market growth, Debtors' business has cratered. Indeed, the current management has run Debtors' operations into the ground, causing a \$41 million default. Simply put, a trustee is necessary to take over Debtors' operations and turnaround the business.

II. A CHAPTER 11 TRUSTEE WILL BE ABLE TO RECOVER AND PRESERVE ASSETS FOR THE ORDERLY LIQUIDATION OF THE DEBTORS AND PROVIDE PAYMENT TO CREDITORS.

Section 1104(b) provides for the appointment of a trustee "if such appointment is in the interests of creditors." 11 U.S.C. § 1104(b). Appointing a chapter 11 trustee would provide the Debtors with a true fiduciary to the bankruptcy estate. A true fiduciary is necessary to recover and preserve assets for the reorganization of the Debtors, and to provide payment to creditors.

Debtors already misappropriated over \$41 million. Where did that money go? How much of that money was fraudulently transferred? The current management is not the proper fiduciary to address the improprieties that occurred. They will not seek to recover fraudulent transfers. They will not seek to recover preferences. They will not cause the Debtors to sue itself for misappropriation of corporate assets. To the contrary, the current management has demonstrated that they will take any and all measures within their power to frustrate Debtors' creditors.

III. REQUEST FOR SHORTENED NOTICE AND EXPEDITED HEARING

Ford Credit requests that this Motion be heard on an expedited basis in conjunction with the continued hearing on use of cash collateral Scheduled for August 16, 2018 at 10:00 a.m.

² In comparison, U.S. car and truck sales totaled only 10.4 million in 2009.

Ford Credit also requests that the Court shorten notice on this motion so that it may be heard on August 16, 2018.

CONCLUSION

Cause exists for the appointment of a chapter 11 Trustee, due to the fraud, dishonesty, incompetence, and gross mismanagement of the affairs of the Debtors. The appointment of a chapter 11 Trustee is also critical, as the current management has little incentive to recover and preserve assets for the reorganization of the Debtors and/or provide payment to creditors.

WHEREFORE, Movant prays that the Court will (i) consider this Motion on an expedited basis; (ii) grant the Motion for Appointment of a Chapter 11 Trustee; and (iii) grant such other relief in favor of the Movant that is just, equitable and proper.

DATED: August 9, 2018

SEVERSON & WERSON
A Professional Corporation

By: /s/ Donald H. Cram
Donald H. Cram

Attorneys for Secured Creditor
FORD MOTOR CREDIT COMPANY LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion was served on the following parties in interest via ECF on this 9th day of August, 2018:

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2. U.S. Trustee's Office
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Dallas, TX 75242
3. All parties receiving notice via ECF in this case.

I further certify that a true and correct copy of the foregoing motion will be served on the following parties in interest listed on the attached matrix via regular U.S. Mail on this 9th day of August, 2018.

/s/ Donald H. Cram

Donald H. Cram

Label Matrix for local noticing
0539-5
Case 18-50214-rlj11
Northern District of Texas
Lubbock
Thu Aug 9 12:04:12 CDT 2018

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Dallas, TX 75242-0996

Valvaline LLC
3499 Blazer Parkway
Lexington, KY 40509-1830

Vickie Williams
102 N. 18th
Lamesa, TX 79331-3320

Wesley Teague
1307 S. 11th
Lamesa, TX 79331-7209

West Texas Filters
P.O. Box 16560
Lubbock, TX 79490-6560

Wilson Electronics
3301 E. Deseret Drive
Saint George, UT 84790-5446

Brad W. Odell
Mullin Hoard & Brown, L.L.P.
P.O. Box 2585
Lubbock, Tx 79408-2585

David R. Langston
Mullin, Hoard & Brown
P.O. Box 2585
Lubbock, TX 79408-2585

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

State Comptroller of Public Accounts
Revenue Accounting Division - Bankruptcy
P.O. Box 13528
Austin, TX 78711

The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

(u)FirstCapital Bank of Texas

(u)Ford Motor Company

(u)Ford Motor Credit Company LLC

(du)Ford Motor Credit Company, LLC

(u)Wells Fargo Bank, N.A.

| | |
|---------------------|-----|
| End of Label Matrix | |
| Mailable recipients | 121 |
| Bypassed recipients | 5 |
| Total | 126 |